POLITICAL OBSTACLES TO ANTI-TRUST LEGISLATION[1]

More than two decades have passed since the enactment of the Sherman Anti-Trust law, and during that time many different phases of experience under it have succeeded one another. The act has not been amended, although changes in its working have been brought about by legislation on related subjects. The measure has been enforced only sporadically and today the question is still urgent: What shall be done with the law? So unsatisfactory has it been, to all appearance; so general has been the demand for something to take its place; so extensively have "trusts" and combinations of capital developed in spite of its existence, that future students of American economic history must inevitably be surprised at the apparent inability of Congress to do anything that would remedy what appears to be an intolerable situation, either by repealing an act which seems to have attained no object, or by correcting admitted defects in it. Before anything can be done toward changing the present status under the Anti-Trust law, it will be necessary, therefore, to understand why Congress does not act regarding it and what are the obstacles, apparently insuperable, that have so effectually blocked progress.

I

The fundamental reason why nothing has been done in Congress, with reference to improving the anti-trust situation, is that there has never been any consistent or satisfactory course which seemed available. On most subjects, at least two distinct policies are contending for a supremacy. Thus on banking we have the conflicting views of those who would establish co-operation or centralization and of those who would continue the independent and highly differentiated system which exists at the present time. On the tariff question we have had throughout our history two clearly marked and opposed lines of policy. The same general distinction can be made in the case of nearly all of the conspicuous economic

[1] A paper read before the Western Economic Society at Chicago, March 2, 1912.

questions of the present day. But when the trust question is approached, the record of vacillation and equivocation surpasses anything in American politics. During the past ten years, it has hardly seemed as if a consistent attitude could be maintained by the federal government from one year to another.

Starting with the view that the Sherman act was nothing more than a mere expression of principle, to be considered rather as a theoretical statement of legal doctrine, of little more binding character than the aphorism that nature abhors a vacuum, or that all men are created equal, the federal administration under President Roosevelt passed to the use of the Sherman law as a means of expressing personal disapprobation, compelling campaign contributions, and visiting punishment upon undesirable citizens. The drawing of a distinction between good and bad trusts, such distinction to be invariably worked out in the office of the Attorney-General, was an incident in this process of development. This was followed by the strenuous suggestion that there be introduced into the Sherman law the word "reasonable," so that only those combinations which were unreasonable should be subject to its pains and penalties. The so-called government supervision or registration plan, whereby concerns engaged in interstate trade should be registered with the Bureau of Corporations and thereby receive a tentative recognition from the government, furnishing meanwhile some data concerning their operations, was still another step forward, and represented the policy of the federal government at the closing of the Roosevelt administration. President Taft's first suggestion was the passage of a federal incorporation bill. A draft of this bill, unofficially made public, showed that it would have provided for practically recognizing and establishing existing trusts, since they would have been allowed to obtain incorporation, but without any adequate provision for the termination of their charters. So strong was the opposition and so severe the criticism visited upon this bill, that the President very wisely dropped it. Then ensued an era of apparently literal application of the Sherman act to combinations of various classes through suits directed at different types of concerns, and through the pressing of the Standard Oil and Tobacco suits to a successful

conclusion. This was in spite of the fact that Attorney-General Wickersham, soon after his appointment to office, had taken occasion, at a gathering of lawyers, to refer in critical terms to the decision of the lower courts in the Tobacco Trust case, and to express the opinion that it was probably not desirable to secure an extension of decrees like this one elsewhere. Coincident with these changes and shifts has been the constant announcement from the White House that the Sherman law itself must be left inviolate, amendments to it being not only undesirable but dangerous, while the fact is completely ignored that the adoption of federal incorporation, demand for which has been this year renewed, would in itself be the most drastic and far-reaching modification of the law that could be conceived.

With such shifts and changes in the White House, with popular education on the subject neglected or perverted, and with a law on the statute books which permitted much sound and fury on the stump, it is not strange that Congress has hesitated to act. Indeed it would seem that any action at a given session would have been followed by demands from the White House practically reversing such action within a year, if they were acceded to. This has not been a comforting prospect. When to this is added the fact that many special interests have grown up around the Anti-Trust law itself, it can be understood that action by Congress was largely out of the question. In a country with our type of government, far-reaching changes of law are obtained only through clear and strong presentation of distinct points of view. Refinements and subtleties twisting and turning "in many a backward streaming curve" have no place in political discussion, and when they are the staple of the argument, they will be disregarded. Particularly is this the case with legislation like the Sherman law whose language is "like a tale of little meaning though the words are strong," and which offers to the stump speaker good mouth-filling phrases in lieu of the necessity of precise and more or less dry argument.

The first political obstacle to the amendment of the Sherman Anti-Trust law therefore is the lack of consecutive presentation and advocacy of some plan of amendment for more than a year at a time.

II

A second obstacle to the amendment of the act, of distinctly political character, is found in the circumstance that during the two decades of its existence strong, although obscure, special interests have grown up, whose interest it is to keep the legislation as it stands. An illustration of what is meant in this connection is seen in the fact that judicial interpretation has applied the law to labor organizations as well as to combinations of capital—whether rightly or wrongly I shall not now attempt to discuss. This is a situation which is naturally acceptable to employers. The large industrial trusts would doubtless prefer to get rid of the pains and penalties of the law themselves, even if in so doing they had to lose a weapon against trades-union bodies. But the case is quite different with the small or independent manufacturer who fears not only the manufacturing competitor possessed of large capital but also the labor union with which he must contend in order to obtain for himself the privilege of existence. While he recognizes the futility of the law in protecting him against capitalistic aggression, and could probably be induced to permit or even support legislation changing the situation as it affects capital, he has a quite different point of view toward labor and labor organizations. He knows that the Sherman law has afforded a valuable means of checking some of the aggressive combined tactics of labor. He knows that in view of the present drift of things, it would be exceedingly difficult to secure the adoption of any legislation in the future which would confessedly and directly apply to such organizations. He therefore prefers to endure such harm as is directly traceable to the Sherman law, and to forego such additional kinds of protection or safeguard as he might obtain from a revision of the law, in order to retain a piece of legislation which he believes can never, in this aspect, be duplicated. It is a fact that whenever proposals have been made to amend the Sherman law in any of the ways already referred to, the interests which have been most in evidence at Washington have been the so-called small or independent manufacturers united for the purpose of preventing any action whatever. Thus united, they have been able to make a particularly strong impression upon

Congress because of their wide dispersal throughout the various congressional districts and because of the speciousness of the plea that it is this very class of independent or small manufacturers which the Anti-Trust law was intended to protect or relieve from undue or unfair competition no matter what might be its source. They have had merely to say the word and congressional committees have hastened to refuse further serious consideration of distasteful bills. Other interests somewhat similar in character have sprung up, and are always ready to press their views upon Congress, so that it is as hard to change our anti-trust legislation as it is to alter the tariff, if not harder, owing to the fact that not all persons can be given the assurance that they will be equally as well off under the new constitutions as under the old ones.

III

The third and probably one of the most serious obstacles of political character to anti-trust legislation is the refusal of politicians to admit that the trust question is complex in its nature and can be dealt with only through action along a number of different lines. This refusal is due partly to positive misunderstanding or inability or unwillingness to reason upon the subject, but also in part to the existence of special interests tending to block the way to action in other directions. For example, take the question of the tariff. Hardly anyone would deny that under certain conditions the tariff may be used as a most efficient agent to bolster up monopoly. Not more than a few persons would deny that in some instances, not necessarily to be named, existing rates of duty do thus serve as a support to monopoly. Yet it has never been practicable to secure any material tariff action designed to remove the aid to monopoly conditions inhering in present rates of duty. In its recent reports on the pulp and paper industry and on woolen goods, the Tariff Board, representing President Taft's administration, made no inquiry into the methods by which these industries are controlled, failed to trace the profits and dividends earned by the different concerns, and had nothing to say of the effect of combinations in fixing prices or of the relations of combinations to the tariff. This attitude has been observed for the most part

upon the floor of Congress, whenever tariff discussion has been active. In so-called "progressive" circles, there has from time to time been more or less vague talk about the existence of trusts that were aided by the tariff. But, in more than ten years' observation of legislative conditions at Washington, I have yet to witness an occasion when it could clearly be demonstrated that changes in duty had been brought about, or had even been seriously proposed, by any influential group in Congress as a means of rectifying oppression on the part of industrial monopolies which were confessedly enabled to maintain prices through the imposition of high-tariff duties. The reason which has always been assigned for this refusal, and which has become practically classic, is that to attempt to attack a monopoly by means of alterations in tariff duties is practically to attempt to break it down by first breaking down the independent or smaller interests in the same industry. The question, of course, must occur to every student of the situation whether, under such conditions, it might not be desirable for a tariff-protected monopoly to safeguard itself by permitting the continued existence of smaller concerns which perhaps were controlled by it, but which in any case were allowed to exist in order to serve as an argument for the maintenance of the tariff system on its old basis. There can be no question that this subterfuge has served constantly to mislead many more or less well-intentioned legislators and to keep them from applying the corrective found in international competition at times when it would have served to put industrial conditions back into a more satisfactory state without further legislation or interference.

Almost equal reluctance has been manifested by legislators toward any action looking to the correction of our patent system. The slightest examination of the present status as to patents shows that the patent system of the present day is hopelessly antiquated and ineffective. It is, and has been for many years, loudly crying for rectification. While foreign countries have adopted the so-called "working clause," we have failed to do so, yet we have kept on bestowing patent monopolies and practically giving away our market without the legitimate requirements that goods shall be manufactured here. In the same way, we have permitted patents

to be bought up and renewed, notwithstanding that they were held idle, no use whatever being made of them except that of suppressing possible competitors who might otherwise have come in to cause trouble or afford a little wholesome competition. Whenever patent legislation has been proposed, it has been met by storms of protest from protected manufacturers owning and holding idle enormous numbers of competitive, or potentially competitive, patents. The protests have been couched in legal and technical language, and have oftentimes had at least a superficial justification. There has been fair reason to question whether bills that have been offered would really help, if passed; and whether, even if they did help somewhat in destroying or checking monopoly, they would not do more harm than good. Few members are willing to devote the time which is necessary to the understanding of so complex and technical a subject as that of patents, and the public at large has failed to recognize the superlative importance of the present application of the patent system in sustaining monopoly conditions. The consequence has been that nothing has been done, and evils have been allowed to perpetuate themselves to an indefinite degree without any correction from Congress. The little effort which was made in the first draft of the tariff act of 1909 to remedy some of the most obvious defects of the patent system almost immediately flattened out, in response to vigorous effort by those who would have suffered from it. As a result the objectionable provision was promptly withdrawn and nothing has since then been attempted.

The political reluctance shown toward dealing with tariff and patent questions in connection with the discussion of the trust problem must be considered in comparison with another tendency which has likewise been instrumental in deferring or preventing a proper treatment of this subject. I refer to the question of campaign contributions. On this point, of course, it is impossible to speak with the absolute certainty which may be felt as to the other two matters. Yet no close observer of politics can doubt that, during the past twenty years, no influence has more seriously retarded proper legislation on the trust question than the practice of soliciting and obtaining from capitalistic combinations large

sums of money to be used in political campaigns. This has prevented the active undertaking of prosecutions as well as the adoption of legislation. It should be admitted that some progress has been made toward the correction of the evil by the passage of legislation requiring publicity of campaign contributions and by the development of a healthy public sentiment on the subject. This, however, does not suffice to correct all the harm in the situation, for the campaign-contribution influence still makes itself felt in obscure ways which are nearly as effectual as the old one. Sound legislation on the trust question will never be secured without full and complete publicity of contributions and without a much fuller enforcement than at present of the requirement that senators and representatives shall not accept retainers from concerns which are interested in legislation.

IV

The outcome of these and many other conditions of the same sort has been that legislators who wish to seem interested in anti-trust legislation have been inclined to devote themselves to more or less ingenious and elaborate propositions which, on the face of things, were unconstitutional or unworkable or injurious. Many bills of this kind have made their appearance. Some of them have prohibited long lists of acts common in business; and, had they been enacted, would probably have brought commercial operations to a standstill, unless indeed the new legislation were consistently violated by those subject to it either with or without the connivance of officers of the law. Others have attempted to throw elaborate restrictions about the control of stock and have sought to prevent so-called "interlocking directorates" from accomplishing anything, or perhaps have sought to destroy the existence of such interlocking directorates. All such bills have been subject to the severe and final criticism that they treated the symptoms and not the disease itself, and that in some cases the results which would have been produced by them would have been more injurious than the evils which it was sought to remedy. Sometimes this kind of legislation has proceeded from ignorance of the real nature of the trust question or inability to analyze the

subject. At other times it has been the outcome of a desire to confuse the situation and to attempt to pose as antagonistic to trusts though willing to give them free scope. Whatever the cause may have been, the result in every instance has operated to prevent the proper treatment of the subject and to confuse and distract public attention from the real issue. Strong language, tremendous penalties, sounding phrases, and strenuous threats have been the staple of anti-trust discussion. It has thundered in the index, but when it came to practical work the product has been pitiably meager. There is some ground for thinking that few politicians would be more regretful to see anything actually done with reference to the trust question than certain of those who are most earnest in demanding something. The trust question has been an exceedingly useful aid upon the stump and is now an almost standard element in every political speech. To lose this either by making the question concrete or by actually closing the debate would be a source of genuine regret to many who would hardly know what to tell their constituencies in future contests.

It may fairly be concluded that there are, from the political standpoint, two principal obstacles to the attainment of any results on the trust question. The first is the lack of sincerity on the part of public men and the second is the lack of analytical power on the part of the public. A third may be added in the refusal of any existing interests to part with the slightest element of advantage they possess, even though by so doing they may contribute to the introduction of a new régime. Progress in Congress will begin when efforts to "solve the trust problem" cease, and when in lieu thereof there is accepted a program of specific and definite enactments upon each of which public opinion can be concentrated in the attempt to get a decision one way or the other. Under our present system of government, it is of little or no use to seek to deal with questions in the large or to pass statutes couched in vague general terms. Still less is it worth while to attempt to correct or abolish existing evils by remedial legislation expressed in terms equally vague and general. It is necessary to take up point after point as experience and business conditions demonstrate the desirability of action on these points. Thus

in the case of the trust question the demands of political expediency call for the abandonment of generalities and particularly of all effort to thrust the whole subject into the hands of an all-powerful commission. For this attempt should be substituted carefully worked out programs of legislation on the tariff, on patents, on campaign contributions, and on all other topics that have been found to be integral elements in the situation. On each of these should be offered definite enactments worked out with a view to the attainment of a specific result on a specific topic. There is nothing abstract or vague in this suggestion, as may be seen by the success which has been had in applying exactly this method in connection with the relation of the trusts to the railroad question. The rebate evil was long pointed to as a means of crushing competition and of building up monopoly. The correction of it was undertaken very late; but, so far as time has afforded the opportunity, it has been effectual. Even more effectual results could be had in the other ways already suggested, and as these various kinds of action work together, the effect would be cumulative in bringing about an improved condition of affairs. It is likely that when the ramifications of the present trust system had been thus dealt with, the remaining and simplified core of the problem would be found to present few difficulties. At any rate, whatever these difficulties were, they would have the merit of being presented in simple and concrete form, and could thus be subjected to tests for the purpose of displaying in a definite form the views of the community with respect to them. That is not possible today. Everyone today admits that trusts are injurious, and ought to be abolished, or at all events that their evil practices and suppression of competition should be done away with. But rarely is it possible to get any consensus of opinion in a given case, with respect to the method of procedure. Nor is it practicable to secure any statements of opinion that are apparently based upon principles of law or of economics applicable to the actual problems involved in such given cases. The simplification of the question by dropping off all allied issues which can be disposed of in the way indicated would therefore be in itself one of the most important aids to the solution of the problem. Simplicity and straightforwardness are,

however, entirely antithetical to political considerations and the necessity for such a method of procedure in itself makes the situation far more than ordinarily difficult from the political standpoint. Results will therefore be secured in proportion as public-spirited men, and organizations sincerely desirous of achieving results, cease to talk in general terms and concentrate their efforts upon specified reforms. The trust problem is not a "problem" in the proper sense of the word, but is a complex group of issues which must be dealt with singly if success is to be attained.

H. PARKER WILLIS

WASHINGTON, D.C.